IN THE SUPREME COURT OF THE UNITED STATES

NO. 79-5951, Misc., October Term 1979

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SUPREME COURT, U.S.

JAMES WILLIAM SUMMITT,

Petitioner

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT (AND APPENDIX)

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CERTIFICATE

I do hereby certify that a copy of this petition was served by depositing the same in a United States mail box, with first class postage prepaid, to Hon. Victor Fox, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on January 16, 1980.

FRANK W. HEFT, JR.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner, James Willard Summitt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which was entered in this case on October 19, 1979.

OPINIONS BELOW

The trial court did not render a written opinion in this case. The judgment of conviction in the trial court was entered on June 4, 1976 and is reproduced in the Appendix at 20. The Kentucky Supreme Court affirmed the judgment of the trial court in Summitt v. Commonwealth, Ky., 550 S.W.2d 548 (1977). This opinion is reproduced in the Appendix at 16-19.

A petition for a writ of habeas corpus was filed in the United States District Court for the Western District of Kentucky at Louisville. The petition was dismissed in a memorandum opinion. The opinion and judgment entered by the United States District Court are reproduced in the Appendix at 11-15. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court. Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir.1979). The opinion and judgment of the United States Court of Appeals for the Sixth Circuit are reproduced in the Appendix at 1-9.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court was entered on October 19, 1979 and this petition for a writ of certiorari is timely filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

DOES CONSTITUTIONAL DUE PROCESS OF LAW REQUIRE A STATE TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE?

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction hereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforece any law which shall abridge the privileges or immunitites of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The petitioner, James Willard Summitt, was indicted in the Jefferson Circuit Court on September 19, 1974 for the rape of Donna Jean Furgason (Transcript of Record, hereinafter referred to as TR 2). The same day Summitt waived arraignment and entered a plea of not guilty to the offense charged (TR 3). On May 17 and 18, 1976, a trial on the merits was held.

The evidence for the prosecution tended to establish that, sometime between 11:30 p.m. on July 20 and 1:30 a.m. on July 21, 1974, the prosecutrix was forced out of her car and into another vehicle (Transcript of Evidence, hereinafter referred to as TE 104), was driven to another location where she was raped, and was then returned to her car (TE 62-63, 105-106, 124, 127-128). The next afternoon, after a discussion with her stepfather, the prosecutrix reported the rape to the police (TE 109, 111). On the evening of July 21, 1974 and again on July 23, 1974, the prosecutrix and her stepfather viewed police photograhs in an attempt to identify her assailant (TR 52-53, 71). On the second date, she identified the photograph of Summitt as her assailant (TE 114). Although the photographs were requested by defense counsel, they were not produced at trial (TE 237). Therefore, it is impossible to determine whether the prosecutrix identified Summitt at her first opportunity and whether her photographic identification was made under highly suggestive circumstances. Although there was no formal lineup identification, Summitt was seen by his accuser in court on at least two occasions before the trial (TE 141-142).

On the day of trial, prior to the time the first witness took the stand, a motion was made to suppress any in-court identification of Summitt (TE 36). The motion was overruled (TE 37). Defense counsel then unsuccessfully asked for a

suppression hearing on the identification issue (TE 37). The prosecutrix was the only witness who testified to the rape. There was no corroborating testimony introduced by other eyewitnesses, nor was any medical or scientific evidence introduced in support of her claim. Moreover, Summitt testified in his own defense and presented other witnesses in support of his claim that he was elsewhere at the time of the crime. Nevertheless, after hearing the evidence, the jury returned a verdict of guilty and recommended a sentence of life imprisonment (TE 270).

The judgment of the trial court was affirmed by the Supreme Court of Kentucky in Summitt v. Commonwealth, Ky., 550 S.W.2d 548 (1977). A petition for a writ of habeas corpus was filed, pursuant to 28 U.S.C. § 2254, with the United States District Court for the Western District of Kentucky at Louisville. The petition for a writ of habeas corpus was dismissed by the district court and the United States Court of Appeals affirmed the dismissal in Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979). This petition for a writ of certiorari is from the order of the United States Court of Appeals affirming the petitioner's conviction.

REASONS FOR GRANTING THE WRIT

THIS COURT HAS NOT SPECIFICALLY ADDRESSED THE QUESTION OF WHETHER CONSTITUTIONAL DUE PROCESS OF LAW REQUIRES A STATE TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE. FURTHERMORE, THERE APPEARS TO BE A CONFLICT BETWEEN CIRCUIT COURTS OF APPEALS ON WHETHER SUCH A HEARING IS CONSTITUTIONALLY REQURIED. THE CASE AT BAR REFLECTS THE NECESSITY TO RESOLVE THIS ISSUE.

At trial, after the selection of the jury but prior to the opening statement by the prosecutor, defense counsel sought to exclude any in-court identification of Summitt because of the possibly suggestive nature of the pretrial procedures used to identify him (TE 37). Counsel also sought a timely hearing to determine the admissibility of the identification (TE 37). Both the motion to suppress and the motion for a hearing were denied. (TE 37).

The procedures to be used in determining the admissibility of identification testimony have been developed in a series of Supreme Court decisions, beginning with United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). If a hearing to determine the admissibility of an identification is not held, the court noted in Wade, at 388 U.S. 240, 87 S.Ct. 1939:

> The state may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself - realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal the unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification.

Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), an early case on photographic identification, held at 88 S.Ct. 971:

> . . . .convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Refining this standard in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the court said, at 409 U.S. 200, 93 S.Ct. 382:

> . . . .the facts to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation.

In Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the court reiterated that "reliability is the linchpin in determining the admissibility of identification testimony" and that the facts to be considered are those set out in Biggers.

In the case at bar, when trial counsel contested the admissibility of the identification, due process required a reliable determination of the disputed facts. Procedurally, the test of reliability has been interpreted as requiring a hearing out of the presence of the jury. In Kentucky, this preferred procedure has been enunciated in Luckett v. Commonwealth, Ky., 550 S.W.2d 517 (1977); Myers v. Commonwealth, Ky., 499 S.W.2d 277 (1973); and Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978).

In United States ex rel Fisher v. Driber, 546 F.2d 18 (3rd Cir. 1976), a case substantially similar to the case at bar, the court felt obligated to "follow the mandate of the Jackson[1] court in determining that Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1962), requires an evidentiary hearing at the state level to determine the factual complex in which the challenged identification was made." The court in Driber went on to say, at 546 F.2d 21:

> The conceptual basis of a Jackson hearing is to permit a defendant to explore his legal contentions without the constraints imposed by the presence of a jury. The state procedures here did not satisfy the salutary rule announced in Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), cert. denied, 394 U.S. 964, 89 S.Ct. 1318, 22 L.Ed.2d 567 (1969), and United States v. Allison, 414 F.2d 407 (9th Cir.), cert.denied, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969). Judge McGowan set forth the test for the District of Columbia Circuit in Clemons:
>
> > Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The court should then, on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same eyewitness is violative of due process.
>
> 408 F.2d at 1237.
>
> A similar test was formulated for the Ninth Circuit by Judge (now Chief Judge) Browning in Allison:
>
> > [W]here a timely and sufficient motion is made to suppress identification testimony on the ground that it has been tainted by pretrial photographic identification procedures, it must be heard and determined by the court outside the jury's presence in the same manner as any other motion to suppress evidence alleged to be inadmissible because unlawfully obtained.

1. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)

414 F.2d at 410. Accord, United States v. Mitchell, 540 F.2d 1163 (3d Cir. 1976). See also United States ex rel. Phipps v. Follette, 428 F.2d 912, 913 n. 1 (2d Cir.), cert.denied, 400 U.S. 908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970); United States v. Cranson, 453 F.2d 123, 125-26 (4th Cir. 1971), cert.denied, 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972); United States v. Sutherland, 428 F.2d 1152, 1155 (5th Cir. 1970), cert.denied, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972); United States v. Broadhead, 413 F.2d 1351, 1359 (7th Cir. 1969), cert.denied, 396 U.S. 1017, 90 S.Ct. 581, 24 L.Ed.2d 508 (1970); Haskins v. United States, 433 F.2d 836, 838-39 (10th Cir. 1970). Cf. United States v. Raneiglio, 429 F.2d 228, 230 (8th Cir.), cert.denied, 400 U.S. 959, 91 S.Ct. 358, 27 L.Ed.2d 268 (1970).

In the case at bar, the prosecutrix identified the defendant out of a book of photographs two days after the occurence. However, the photograph in question was not produced by the Commonwealth either before or at trial. Thus, prior to his cross-examination of the prosecutrix at trial, it was impossible for defense counsel to know whether she became aware of Summitt's physical characteristics at the time of the rape or whether she became aware of them for the first time in viewing the photograph. Moreover, defense counsel established on cross-examination that Summitt may have been viewed by the prosecutrix on at least two occasions at the courthouse prior to the trial, with only a prosecutor and a police officer in the room, and without benefit of counsel. This may have bolstered the prosecutrix' identification at trial (TE 142 -145).

The obvious uncertainty of the identification was such that defense counsel could not afford to leave it unexplored. However, in the absence of a hearing, the only method available to him to uncover the taint and its prejudicial repercussions was a "fishing expedition" at trial. Lacking knowledge of the extent of the problem, he could not even intelligently object to the introduction of the evidence. Because defense counsel was unable to determine prior to

trial the extent of the unfairness of the identification, he was put in the untenable position of trying by cross-examination of the prosecutrix "to discover and reveal the unfairness, while bolstering the courtroom identification by bringing out and dwelling upon his prior identification." Cf. Wade, supra, at 388 U.S. 240, 87 S.Ct. 1939.

In disposing of this contention, the district court below noted at Appendix 11-12.

> The prosecuting witness identified the petitioner after viewing about 1200 photographs at Jefferson County Police Headquarters. Her testimony and the testimony of Detective Sanders, the investigating officer, withstood vigorous and extensive cross-examination on the possible suggestive nature of the identification procedure. Both the prosecuting witness and Sanders were adamant in their assertion that the prosecuting witness had identified petitioner without any suggestion from Sanders.

The district court below also relied heavily on the vigorous and extensive cross-examination of the prosecutrix and police officer to reaffirm the lack of suggestiveness of the identification. However, this forced cross-examination resulted in the very type of bolstering which Wade condemns and which could have been avoided if a suppression hearing had been held. Indeed, because no hearing was held, defense counsel was forced to lead both the prosecutrix and the police officer into those adamant assertions which the district court relies on in its opinion.

In Summitt v. Bordenkircher, 608 F.2d 247, 251 (6th Cir. 1979) the Court of Appeals concluded that:

> . . .as applied to identification evidence, Jackson v. Denno, supra and Pinto[2], supra, only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

2. Pinto v. Pearce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967).

Since the defense counsel was forced to explore the reliability of the identification on cross-examination in the presence of the jury, it cannot be found that such a procedure constituted an adequate hearing on the reliability and admissibility of the identification evidence. The utilization of such a procedure places defense counsel in precisely the untenable position envisioned in Wade v. United States, supra. While trying to challenge the reliability of the identification in the presence of the jury, defense counsel runs the inherent risk of causing irreparable prejudice to his client by unavoidably bolstering the courtroom identification through cross-examination. This is an inevitable result of the hearing deemed adequate by the Sixth Circuit in Summitt v. Bordenkircher, supra.

The Third Circuit's decision in United States ex rel. Fisher v. Driber, supra, is in direct conflict with the Sixth Circuit's decision in Summitt v. Bordenkircher, supra. Analogizing the principles enunciated in Jackson v. Denno, supra, to Fisher, the Third Circuit concluded that a state trial court is constitutionally required to conduct a hearing out of the presence of the jury on the reliability and admissibility of identification evidence where the request for such a hearing is not a frivolous one. The case at bar presents a serious question of identification. By denying an in camera hearing on the reliability of the identification evidence, the state trial court forced the issue to be resolved in the presence of the jury. Prejudice from such a procedure can be presumed by the maximum sentence imposed on the petitioner.

Defense counsel raised the issue of tainted identification by requesting a hearing at the outset of the trial.(TE 37) It was then incumbent upon the court to determine the reliability of the identification. To avoid compounding any impermissible suggestiveness, the court should have made the determination in a hearing out of the presence of the jury. Alternatively, the court should have recognized its duty to determine the reliability of the identification at trial by those factors set out in Biggers. In Manson v. Brathwaite, supra, the Supreme Court specifically

enumerates the factors which must be considered when a challenge to a pre-trial identification is raised, in order to determine whether it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Manson court articulated these factors at 97 S.Ct. 2253:

> . . . .the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

The court in Manson then proceeds to analyze these factors individually, devoting a numbered paragraph to each, thus demonstrating the manner in which this analysis is to be conducted. There is less potential for prejudice to the defendant if these factors are considered in the setting of a suppression hearing. However, the fact that a hearing is not held does not obviate the necessity for a reliable determination of those factors. This determination must be made at the trial level to afford the defendant his right to effective counsel, as well as to insure his right to a fair trial.

By contrast in the case at bar, the reviewing courts below have attempted to determine the reliability of the identification retrospectively. Such a retrospective ruling can only hypothesize about questions which might have been asked, but were not because of the presence of the jury. Moreover, such a retrospective determination completely ignores the prejudice to the defendant which results from his being required to test the identification through blind cross-examination at trial. It is virtually impossible at the appellate level to determine what price the defendant has paid for his efforts to expose a suggestive identification. Consequently, post-conviction findings do not provide a reliable substitute for a suppression hearing at the trial hearing. Under the circumstances presented, nothing short of a contemporaneous hearing could have satisfied Summitt's right to a fair trial consonant with due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, that this Court should issue a writ of certiorari and review the rulings of the courts below.

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IN THE SUPREME COURT

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NO. _____

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James Willard SUMMITT,
Petitioner-Appellant,

v.

Donald E. BORDENKIRCHER, Warden,
Kentucky State Penitentiary,
Respondent-Appellee.

John Gregory WATKINS,
Petitioner-Appellant,

v.

Donald E. BORDENKIRCHER, Warden,
Kentucky State Penitentiary,
Respondent-Appellee.

Nos. 78-3415, 78-3587.

United States Court of Appeals,
Sixth Circuit.

Argued June 5, 1979.

Decided Oct. 19, 1979.

On appeals from orders of the United States District Court for the Western District of Kentucky, Thomas A. Ballantine, Jr., J., and Charles M. Allen, J. denying state prisoners' petitions for writ of habeas corpus, the Court of Appeals, Bailey Brown, Chief Judge, held that it is not a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence, even though a hearing outside the jury's presence is preferable.

Affirmed.

Merritt, Circuit Judge, filed a dissenting opinion.

1. Constitutional Law ⇐266(3.5)

It is not a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence, even though a hearing outside the jury's presence is preferable. U.S.C.A.Const. Amends. 5, 14.

2. Constitutional Law ⇐266(3.2)
Criminal Law ⇐641.2

A defendant is entitled to have counsel present at any corporeal identifications which occur after the initiation of criminal proceedings, but even where the right to counsel is not applicable, due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. U.S. C.A.Const. Amends. 5, 14.

3. Criminal Law ⇐339.9(1)

Whereas the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

4. Criminal Law ⇐339.9(2)

Among the factors relevant to the reliability of identification evidence are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated by him at the confrontation, and the length of time between the crime and the confrontation.

5. Criminal Law ⇐339.7(1)

Under some circumstances, the use of a photographic display may enhance the possibility of misidentification, but each case must be considered on its own facts.

6. Criminal Law ⇐339.7(1)

In respect to the pretrial photographic identification of rape defendant, there was no substantial likelihood of misidentification by reason of the introduction at trial of the victim's pretrial identification, since the pretrial identification could not be characterized as either suggestive or unreliable; the victim had ample opportunity to study her assailant, she provided the police with a detailed and accurate description, and soon after the attack she identified defendant from among a multitude of police photographs that were presented in a neutral fashion.

7. Criminal Law ⇐339.8(2)

A showup is inherently suggestive.

8. Criminal Law ⇐339.8(1)

When only one person is presented to a witness, there is a natural tendency for the witness to feel obligated to provide a positive identification, but in some cases a showup becomes a necessary identification procedure.

9. Criminal Law ⇐339.8(5)

Identification of defendant by robbery victim at showup was not so unreliable as to create a substantial likelihood of misidentification, where the showup, rendered necessary by the seriousness of hospitalized robbery victim's wounds, was conducted in a manner that did not take advantage or augment its inherent suggestiveness, where the victim had had a clear, albeit brief, opportunity to view the person robbing the liquor store, and where the identification at the showup reflected an element of uncertainty, but that element was very small.

10. Criminal Law ⇐339.8(2)

Unlike a showup, a lineup need not be and should not be unduly suggestive.

11. Criminal Law ⇐339.8(2)

Unnecessary suggestiveness in a lineup does not, by itself, require the exclusion of the identification as long as it contains sufficient indicia of reliability.

12. Criminal Law ⇐339.8(4)

Based on the totality of the circumstances, lineup identification of defendant by liquor store robbery victim was sufficiently reliable that there was no substantial likelihood of misidentification, even though the lineup was suggestive in that defendant was of a somewhat lighter complexion than the other two persons in the lineup.

13. Constitutional Law ⇐266(3.2)

A defendant is denied due process only when the identification evidence is so unreliable that its introduction renders the trial unfair. U.S.C.A.Const. Amends. 5, 14.

14. Criminal Law ⇐741(2)

As long as there is not a substantial likelihood of misidentification, it is the function of the jury to determine the ultimate weight to be given identification evidence.

15. Constitutional Law ⇐268(8)

While several of the prosecutor's closing remarks, concerning defendant's character and the threat to the community, were improper, they were not so pervasive nor so prejudicial as to deny defendant due process. U.S.C.A.Const. Amends. 5, 14.

16. Criminal Law ⇐713

Point at which improper argument amounts to a constitutional deprivation can only be defined by reference to the totality of the circumstances of the particular case.

Terrence R. Fitzgerald, Chief App. Defender, Louisville, Ky. (Court-appointed), for petitioner-appellant.

John Gregory Watkins, pro se.

Robert F. Stephens, Atty. Gen. of Kentucky, Victor Fox, Asst. Atty. Gen., Frankfort, Ky., for respondent-appellee.

Before LIVELY and MERRITT, Circuit Judges, and BROWN,* District Judge.

BAILEY BROWN, Chief Judge.

[1] These two appeals were consolidated for the purpose of considering whether it is a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence. We conclude that such a hearing is not constitutionally required and that the introduction of identification evidence in these cases did not violate due process standards. Accordingly, we affirm the decisions of the district courts.

The petitioner, James Willard Summitt, was indicted for rape on September 19, 1974. The rape occurred in Jefferson Coun-

* Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

ty, Kentucky late in the evening of July 20, 1974 when two men forced the victim, Donna Jean Furgason, into their car. The incident took place over a period of approximately forty-five minutes.

On July 21, 1974, Ms. Furgason reported the rape to the police. She described her assailant as a white male in his thirties, approximately five feet nine inches, 180 pounds, with tattoos on both arms. She looked through approximately twelve volumes of photographs at the county police headquarters in an attempt to identify the person who had raped her. Two days later, she was taken to the city police headquarters to review additional volumes of photographs. At that time, she identified a photograph of James Willard Summitt.

Prior to trial, Summitt moved to suppress any in-court identification by Ms. Furgason and requested a hearing out of the presence of the jury to determine the admissibility of the identification evidence. That motion and request were denied.

At trial, both the pretrial photographic identification and an in-court identification were introduced. At the conclusion of the evidence, the jury returned a verdict of guilty and recommended life imprisonment. On appeal to the Kentucky Supreme Court, the conviction was affirmed.

The petitioner, John Gregory Watkins, was indicted in March, 1975 for armed robbery and assault. The robbery took place at a liquor store in Louisville, Kentucky. During the course of the robbery, an employee in the store was shot in the wrist and in the heart.

Donald Goeing, the employee who was shot, described the robber as a young, black man with a light complexion. Walter Smith, the other employee in the store, described the robber as a black man with a light complexion, thirty to thirty-five years old, and approximately five feet, nine inches tall.

Two days after the robbery, Walter Smith viewed a lineup consisting of three black men, one of whom was the petitioner Watkins. Watkins had a lighter complexion than either of the other two men in the lineup, though none of them had a particularly dark complexion. Smith identified Watkins but admitted that he was not "completely sure" that Watkins was the person who robbed the store.

On the same day, Watkins was taken to the hospital room where Donald Goeing was recovering from his wounds. Goeing identified Watkins, but at the same time he stated that "it could have been close enough that it could have been his twin brother, it could have been somebody else."

Prior to his trial, Watkins filed a motion seeking a pre-trial hearing on the admissibility of the identification evidence. The trial judge denied the motion.

At the trial, the prosecution relied on the in-court identifications of Watkins by both Smith and Goeing. On cross-examination, the circumstances surrounding both the lineup and the showup were brought out. Moreover, both Smith and Goeing admitted having seen Watkins in the courtroom on several occasions prior to trial. At the conclusion of the prosecutor's proof, the trial court denied Watkins' motion for a mistrial based on the introduction of the identification evidence. The jury returned a verdict of guilty and recommended the maximum sentence. On appeal to the Kentucky Supreme Court, the conviction was affirmed.

[2] In both of these cases, the central dispute at trial was over the identification of the person who committed the crime. In every criminal trial, there exists some danger of misidentification. That inherent danger, however, is significantly increased whenever the identification is tainted by unnecessary and unduly suggestive procedures. To deter the use of suggestive identification procedures, the Supreme Court has held that a defendant is entitled to have counsel present at any corporeal identifications which occur after the initiation of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). *See also Moore v. Illinois*, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977);

United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Even where the right to counsel is not applicable, however, "due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois, supra*, 434 U.S. at 227, 98 S.Ct. at 464. It is this latter due process protection which the petitioners claim was violated in their state trials.

The initial issue presented by these appeals is whether the admissibility of identification evidence must be determined at a hearing outside the presence of a jury. We have no doubt that such a procedure is the preferable one. See *Nassar v. Vinzant*, 519 F.2d 798 (1st Cir.), *cert. denied*, 423 U.S. 898, 96 S.Ct. 202, 46 L.Ed.2d 132 (1975). *See also United States v. Poe*, 462 F.2d 195 (5th Cir. 1972), *cert. denied*, 414 U.S. 845, 94 S.Ct. 107, 38 L.Ed.2d 83 (1973); *United States v. Cranson*, 453 F.2d 123 (4th Cir. 1971), *cert. denied*, 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972); *United States v. Allison*, 414 F.2d 407 (9th Cir.), *cert. denied*, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969); *Clemons v. United States*, 133 U.S.App.D.C. 27, 408 F.2d 1230 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 964, 89 S.Ct. 1318, 22 L.Ed.2d 567 (1969). An independent hearing on the admissibility of identification evidence, either before trial or at trial outside the presence of the jury, would remove the disadvantage to defendant's counsel of investigating the propriety of the identification evidence in the presence of the jury. In addition, it would protect the jury from being exposed to evidence that might subsequently be determined inadmissible. Kentucky state courts have apparently since endorsed this procedure. *See Brown v. Kentucky*, 564 S.W.2d 24 (Ct.App.1978). The issue in this case, however, is not whether a hearing outside the presence of the jury is the preferable procedure but whether such a procedure is constitutionally mandated.

In *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the Supreme Court held that a defendant's due process rights were violated by a procedure which allowed the same jury that determined the guilt or innocence of a defendant to determine simultaneously the issue of the voluntariness of the defendant's confession. The fundamental premise of *Jackson* was that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, *without regard for the truth or falsity of the confession.*" *Jackson v. Denno, supra* at 376, 84 S.Ct. at 1780. (Emphasis added.) A jury that is considering the guilt or innocence of a defendant is likely to allow the truthfulness of a confession to influence its determination of the voluntariness of the confession. To avoid this danger, *Jackson* established the procedural requirement that, prior to the admission of a confession, the trial judge must make an independent determination of its voluntariness after an adequate hearing on the issue. "[T]he purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts." *Lego v. Twomey*, 404 U.S. 477, 486, 92 S.Ct. 619, 625, 30 L.Ed.2d 618 (1972). Its purpose is to protect the due process right against the introduction of involuntary confessions, regardless of their reliability.

[3] The basis of the due process right against suggestive identification procedures is significantly different.

It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377 at 384 [88 S.Ct. 967, 19 L.Ed.2d 1247]. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a de-

fendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Neil v. Biggers, 409 U.S. 188 at 198, 93 S.Ct. 375 at 381-382, 34 L.Ed.2d 401 (1972). Thus, whereas the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

We construe *Pinto v. Pierce*, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967), as holding that due process does not require that the hearing upon which the trial judge makes his independent determination of voluntariness, as is required by *Jackson v. Denno, supra*, be held outside the presence of the jury.[1] The Supreme Court has never ruled on the precise question presented here. We conclude, however, that, by analogy to the ruling in *Pinto*, due process does not require a hearing outside the presence of the jury on the issue of the reliability of identification evidence. We recognize, as is pointed out in the dissent citing language in *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), that trial counsel for defendant does bear an extra burden in exploring the reliability of identification evidence in the presence of the jury. However, we note that the issue before us now was not the issue before the Court in *Wade*, and, further, *Pinto* was decided shortly after *Wade*. Moreover, it appears to us that the burden of exploring the voluntariness issue before the jury would be at least as great as the burden of exploring the reliability of identification evidence before the jury.

The decision of the Third Circuit in *United States v. Driber*, 546 F.2d 18 (1976), relied upon by the dissent, does hold that due process requires that the court hold the hearing to determine the admissibility of identification evidence out of the presence of the jury if the request for such a hearing is "not frivolous." (*Driber*, at 22). We note, however, that in many cases it would be difficult, if not impossible, to determine whether the request was frivolous without holding the hearing. Moreover, *Driber* relies on federal precedents which may well be examples of the exercise of supervisory powers rather than rulings on the requirements of due process.

We conclude, then, that as applied to identification evidence, *Jackson v. Denno, supra*, and *Pinto, supra*, only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

[4] Having determined the initial procedural issue, we turn next to the substantive issue of whether the introduction of identification evidence in these cases violated due process standards. As we have previously indicated, reliability is the key factor in determining the admissibility of identification evidence. Among the factors relevant to reliability are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers, supra*, 409 U.S. at 199, 93 S.Ct. at 382. These factors must be weighed against the effect of the suggestive procedure to determine whether the identifica-

1. We also recognize that the decision is placed on the alternative ground that trial counsel of defendant did not object to holding such hearing in the presence of the jury.

tion is so unreliable as to create a substantial likelihood of misidentification. *See Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

[5, 6] The identification evidence introduced at the trial of the petitioner, James Willard Summitt, consisted of both an in-court identification and a pretrial photographic identification. Under some circumstances, the use of a photographic display may enhance the possibility of misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). But each case must be considered on its own facts. *United States v. Ayendes*, 541 F.2d 601 (6th Cir. 1976), *cert. denied*, 429 U.S. 1063, 97 S.Ct. 789, 50 L.Ed.2d 779 (1977). The pretrial photographic identification in this case cannot be characterized as either suggestive or unreliable. Ms. Furgason had ample opportunity to study her assailant. She provided the police with a detailed and accurate description. Soon after the attack, she identified Summit from among a multitude of police photographs that were presented in a neutral fashion. Under these circumstances, we cannot find that there was a substantial likelihood of misidentification. Since we find that introduction of the pretrial identification was not improper, we need not consider whether the in-court identification had an independent basis.

[7–9] At the trial of the petitioner, John Gregory Watkins, the prosecution introduced in-court identifications by the two witnesses to the robbery, Walter Smith and Donald Goeing. These identifications were based on a pretrial lineup and a pretrial showup. Since we believe that there was no independent source for the in-court identifications, the validity of their admissibility is dependent on the validity of the pretrial identification procedures.

A showup is inherently suggestive. When only one person is presented to a witness, there is a natural tendency for the witness to feel obligated to provide a tive identification. But in some cas showup becomes a necessary identific procedure. *Stovall v. Denno*, 388 U.S. 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). en the seriousness of the wounds to Do Goeing, a showup was necessary in case. That showup was conducted i manner that did not take advantag augment its inherent suggestiveness. (ing had had a clear, albeit brief, opport ty to view the person robbing the lic store.[2] At the showup, Goeing's identif tion of Watkins reflected an element uncertainty, but that element was v small. Based on the totality of the circu stances, we cannot conclude that the ide fication at the showup was so unreliable to create a substantial likelihood of misid tification.

[10, 11] Unlike a showup, a lineup ne not be and should not be unduly suggesti The lineup in this case, however, to so degree employed the key element of t witness' description, lightness of comple ion, to set Watkins apart from the oth two persons in the lineup. Watkins, accor ing to the picture of the lineup, was of somewhat lighter complexion than the ot er two persons in the lineup. Such an ide tification procedure probably could hav been avoided. But, even so, unnecessar suggestiveness by itself does not require th exclusion of the identification as long as i contains sufficient indicia of reliability *Neil v. Biggers, supra*, 409 U.S. at 198, 9 S.Ct. 375.

In addition to the suggestiveness of th lineup, there are several facts which indi cate possible unreliability. Walter Smitl admitted that at the time of the lineup h "wasn't completely sure" that Watkins wa the robber. Moreover, Smith originally described the age of the robber as approximately thirty to thirty-five, whereas Watkins was significantly younger. These facts must be weighed against the facts which

2. The liquor store was well-lit. Goeing was in the process of filling a cooler with soft drinks. When he heard the words, "This is a holdup," he turned and looked at the robber. Goeing's movements evidently caused the robber to shoot him. Goeing lost consciousness about five seconds later as the robber fled from the store.

ect reliability. Smith had a good opportunity to look at the person robbing the e.[3] While his identification at the line- contained a degree of uncertainty per- s greater than Goeing's identification at showup, the degree of uncertainty was substantial. That initial uncertainty not continue. Moreover, Smith was not osed to any additional suggestive proce- es. *See Foster v. California*, 394 U.S. , 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).

12] The admissibility of the lineup ntification presents a very close question. : based on the totality of the circum- nces we believe that it was sufficiently able that there was no substantial likeli- d of misidentification.

13, 14] The issue with respect to each of the identifications in these cases is ited to whether their introduction into lence violated due process. A defendant enied due process only when the identifi- ion evidence is so unreliable that its in- duction renders a trial unfair. As long there is not a substantial likelihood of identification, it is the function of the y to determine the ultimate weight to be en the identification. *Manson v. Brathwaite, supra*. Given the limited focus of inquiry, we hold that the introduction identification evidence in these trials did violate due process.

[15, 16] Finally, we consider the petitioner Watkins' claim that the prosecutor's closing argument deprived him of a fair trial. There is little doubt that several of the prosecutor's remarks were improper.[4] But impropriety alone is not sufficient. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "The prosecutorial argument must be so egregious so as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir. 1979). That point at which improper argument amounts to a constitutional deprivation can only be defined by reference to the totality of the circumstances of the particular case. In this case, we are convinced that the prosecutor's remarks were not so pervasive nor so prejudicial as to deny the petitioner due process.

Each of the issues raised in these appeals involve alleged violations of due process. Our scope of review, therefore, is limited to whether the conduct complained of was contrary to basic notions of fairness. Applying this narrow standard of fairness, we conclude that the judgments of the district courts must be and are

AFFIRMED.

MERRITT, Circuit Judge, dissenting.

In each of these habeas corpus cases from Kentucky, there is a serious question concerning the reliability of the courtroom

[3] Smith was standing at the cash register when three men walked in. One man approached him and asked him for cigarettes. When Smith turned back around, the man had pulled a gun and stated, "This is a holdup." Thus, Smith was face-to-face with the robber for the brief time that the robbery was in progress.

[4] In his closing argument, the prosecutor stated:

". . . When they go to the penitentiary they are going to be in the same enclosure with people like themselves who have no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that away from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in

. . . . . .

The only way that we can have any effect on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so long that you tell everybody in connection with the prisons and the authorities, from the Governor on down, that we don't want this man or men like him in our community.

. . . This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or have any respect for other people. The only way you can get them to behave is to get tough with them."

We have considered similar remarks concerning the defendant's character and the threat to the community to be beyond the bounds of propriety. *United States v. Barker*, 553 F.2d 1013 (6th Cir. 1977).

identification of the defendant as the perpetrator of the crime. In both, the identification testimony constitutes the only substantial evidence linking the defendant with the crime. In both, the state trial judge denied the request of defense counsel for a hearing on the question out of the presence of the jury. In such circumstances, I would follow Judge Aldisert's opinion for the Third Circuit in *United States v. Driber*, 546 F.2d 18 (1976), holding that due process requires a hearing out of the presence of the jury where serious identification questions are present. Otherwise, defense counsel is paralyzed in his efforts to defend his client. He is in the untenable position, as the Supreme Court noted in *United States v. Wade*, 388 U.S. 218, 241, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967), of trying by cross-examination of the identification witness "to discover and reveal unfairness, while bolstering the . . . courtroom identification by bringing out and dwelling upon his prior identification."

In re ESTATE of B. Joseph RATH, Deceased.

The DETROIT BANK AND TRUST COMPANY, Executor, and Catherine Rath, Surviving Wife, Plaintiffs-Appellees,

v.

UNITED STATES of America, Defendant-Appellant.

No. 77-1403.

United States Court of Appeals, Sixth Circuit.

Argued June 8, 1979.

Decided Oct. 19, 1979.

Beneficiary of life policy brought action to recover income taxes. The United States District Court for the Eastern District of Michigan, Philip Pratt, J., entered judgment in favor of taxpayer and government appealed. The Court of Appeals, Cecil, Senior Circuit Judge, held that, under the circumstances, the proceeds of the policy were ordinary income to the beneficiary to the extent that they exceeded the amount which she had paid to a corporation to purchase policy from it, together with the premiums which she had paid.

Reversed and remanded.

1. Internal Revenue ⇐410.1

In the absence of any action on the part of deceased insured whereby there was a transfer of insurance policy from the corporation to himself, under the terms of an option which he held, and a subsequent transfer from himself to his wife, even though the husband may have given the wife the money with which she made the purchase from the corporation, where the policy was transferred from the corporation to the insured, the amounts received under the policy following the insured's death were ordinary income to the wife to the extent that they exceeded the amount which she paid for the policy in the amount of premiums which she subsequently paid. 26 U.S.C.A. (I.R.C.1954) § 101.

2. Internal Revenue ⇐410.1

Fact that corporation placed a value of $11,600 on life policy at the time that it was conveyed to insured's wife, whereas the value of the policy for gift or estate tax purposes was $17,500, did not show that the transfer of the policy from the corporation to the wife was in part a sale by the corporation and in part a gift by the insured, who had directed that the policy be assigned to his wife. 26 U.S.C.A. (I.R.C.1954) § 101.

3. Internal Revenue ⇐410.1, 1202

Although private ruling and revenue ruling supported the view that deceased insured possessed incident of ownership in policy for estate tax purposes because of his right to purchase the policy from the corpo-

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

No. 78-3415

OCT 19 1979

JOHN P. HEHMAN, Clerk

JAMES WILLARD SUMMITT,

Petitioner-Appellant,

v.

DONALD E. BORDENKIRCHER, WARDEN, KENTUCKY STATE PENITENTIARY,

Respondent-Appellee.

Before: LIVELY and MERRITT, Circuit Judges, and BROWN, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

John A. Hehman
Clerk

Issued as Mandate: November 19, 1979

COSTS: None

Filing fee.....$.....
Printing $.....

A True Copy.

Attest:

Dorothy J. Phillips

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT

Summit vs. Sowders — C 78-0165-L(B)

DATE	NR.	PROCEEDINGS
1978 5/1		Writ of Habeas Corpus tend to U. S. Magistrate.
5/2	1.	ORDER signed by Judge Booth 5/1/78 that Petition ord filed w/out prepayment of fees, etc. RESPONDENT shall file ans w/in twenty (20) days from date of ent of ord pursuant to Rule 5. Cys to Petitioner, Coun of Rec., AG-KY.
5/2	2.	Writ filed w/Memorandum of Law in Support thereof. Cy to Petitioner and AG-KY.
5/19/78	3	MOTION TO DISMISS or in the alternative for s/j by respondent; memo. in support order tend. Transcript of proceedings attached.
5/24/78	4	Traverse to response; response to mo. to dismiss; mo. for s/j by petitioner.
6/1/78	5	MEMORANDUM by Judge Ballantine. See order of this date.
6/1/78	6	ORDER by Judge Ballantine that petition for writ of habeas corpus is denied. Ccs: counsel.
6/27	7.	NOTICE OF APPEAL filed from Order 6/1/78.
6/27/78	8.	REQUEST for Certificate of Probable Cause filed.
7-12	9.	Certificate of Probable Cause issued by Judge Ballantine. Cc to Mr. Fitzgerald and Atty. Gen., Ky.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES WILLARD SUMMITT Petitioner	)	
v.	)	NO. C 78-0165-L(B)
DONALD BORDENKIRCHER, Warden Kentucky State Penitentiary Respondent	)	

MEMORANDUM

This is a petition for a writ of heabeas corpus pursuant to Title 28 U.S.C. Section 2254.

In May, 1976, a Jefferson Circuit Court Jury convicted petitioner of rape. He was sentenced to life imprisonment and his conviction was affirmed by the Supreme Court of Kentucky. Summitt v. Commonwealth, Ky., 550 S.W.2d 448 (1977).

Petitioner's conviction rested on the uncorroborated testimony of the prosecuting witness. She identified him as her assailant from Police "mug shots." At the trial petitioner moved to suppress the in-court identification, asserting that the mug shot identification was impermissibly suggestive. The motion to suppress was denied, as was a motion for a hearing on the identification issue.

The prosecuting witness identified the petitioner after viewing about 1200 photographs at Jefferson County Police Headquarters. Her testimony and the testimony of Detective Sanders, the investigating officer, withstood vigorous and extensive cross-examination on the possible suggestive nature of the identification procedure. Both the prosecuting witness and Sanders were adamant in their

assertion that the prosecuting witness had identified petitioner without any suggestion from Sanders.

Petitioner urges that Simmons v. U.S., 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), mandates that the writ be granted. Petitioner quotes out of context a portion of the Court's opinion. Apparently in transcribing from the opinion, one line was omitted, and the Court finds that the omission of that line produces a different effect than was intended by the Court. In Simmons the Supreme Court said:

> "We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

The emphasized language quoted above was omitted from the petitioner's brief.

Petitioner also seeks comfort from Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

In Neil, the Court adhered to its holding that if the totality of the circumstances indicated that the identification was reliable, suggestive confrontation procedures would not render the identification constitutionally invalid.

In the case before this Court the prosecuting witness was in the presence of the petitioner for about 45 minutes. She had ample opportunity to observe his physical characteristics and her description to the police included the observation that petitioner had tattoos on both arms. Petitioner, in fact, has tattoos.

P-034-B

Given the totality of the circumstances, the Court cannot find that the identification procedure violated any constitutional guarantees, and the refusal of the trial court to grant an evidentiary hearing was not erroneous.

Petitioner's second argument is that two questions and answers impermissibly commented on his silence. The testimony was as follows:

> "18 And did you advise him of his Miranda rights before you talked to him, or was he advised of his rights?
>
> A Yes, sir, I advised him of his rights.
>
> 19 Did he give a statement to you of any kind?
>
> A. No, sir, he did not." (TE p. 55).

No objection was made to this testimony and the Court finds that Wainwright v. Sykes, ____ U.S. ____, 97 S.Ct. 2497 (1977), is dispositive of this position. There, the Supreme Court said:

> "We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that petitioner's confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here. See Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408 (1965). We thus come to the crux of this case. Shall the rule of Francis v. Henderson, supra, barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? (Footnote omitted). We answer that question in the affirmative."

The Court finds that the failure to avail himself of an independent and adequate state procedural ground prevents direct review here.

An Order has been entered this date denying the petition for writ of habeas corpus.

This 31st day of May, 1978.

Thomas A. Ballantine Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:

Petitioner
Counsel of record

ENTERED
JUN 1 1978
JESSE W. GRIDER, CLERK
BY DEPUTY CLERK
Barbara Cracraft

P-834-B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES WILLARD SUMMITT Petitioner	)	
v.	)	NO. C 78-0165-L(B)
DONALD BORDENKIRCHER, Warden Kentucky State Penitentiary Respondent	)	

ORDER

For the reasons set forth in the Memorandum filed this date,

It is ORDERED that the Petition for Writ of Habeas Corpus be and it hereby is denied.

There is no just reason for delay, and this is a final and appealable Order.

This 31st day of May, 1978.

Thomas A. Ballantine Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:

Counsel of record
Petitioner

ENTERED
JUN 1 1978
JESSE W. GRIDER, CLERK
DEPUTY CLERK

Jessie Grider

Court, in view of section of State Constitution providing that appeal from judgment of circuit court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. Const. § 110(2)(b).

James Williams, pro se.

E. N. Venters, Judge, Pike Circuit Court, pro se.

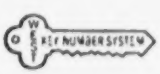
REED, Chief Justice.

The petitioner, James Williams, who alleges that in September of 1953 he was sentenced to life imprisonment for armed robbery, has filed in this court for the third time a petition for an order of mandamus directing the respondent judge to have the clerk of his court prepare a transcript of the petitioner's trial record. The previous applications were denied.

[1, 2] Section 110(2)(b) of the Kentucky Constitution as amended effective January 1, 1976, provides that an appeal from a judgment of the circuit court "imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court." A judgment or order denying a postconviction motion, however, is not a judgment "imposing a sentence." Hence an appeal from it is addressable to the Court of Appeals. By parity of reasoning, so is a petition for mandamus or prohibition seeking to enforce or prevent an action by a circuit judge in a postconviction proceeding. Cf. *Coffey v. Anderson*, Ky., 371 S.W.2d 624, 625 (1963); *Northcutt v. Shelton*, Ky., 436 S.W.2d 264 (1969).

The petition is dismissed.

All concur.



James Willard SUMMITT, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Supreme Court of Kentucky.

April 22, 1977.

Defendant was convicted in the Jefferson Circuit Court, Criminal Branch, Second Division, Indictment No. 152462, John P. Hayes, J., of rape and he appealed. The Supreme Court, Palmore, J., held that: (1) although it was error to permit police officer, the first witness, to testify as to the substantive details of description of assailant given to him by victim, the error was erased when the victim subsequently testified and was cross-examined, thus making the testimony of the police officer admissible to corroborate the victim's identification of defendant; (2) victim was properly permitted to make in-court identification of defendant; and (3) any error in permitting prosecutor to ask police officer if defendant had made a statement after he was advised of his *Miranda* rights was not prejudicial.

Affirmed.

1. Criminal Law ⇨421(6)

Testimony by police detective, who was the first witness called by the Commonwealth, concerning the substantive details of the report which prosecutrix had given him before she looked through photographs from which she identified defendant was hearsay and inadmissible at that stage of the trial.

2. Witnesses ⇨414(2)

Once attack was made on credibility of prosecutrix through cross-examination, testimony by police officer to the effect that the prosecutrix had accurately described defendant before she saw photographic display from which she chose defendant's pho-

tograph was competent for corroborative purposes.

3. Criminal Law ⇐1169.4

Although it was error to permit police detective, who was the first witness, to testify at that point in the trial as to the substantive details of description of assailant given to him by prosecutrix before prosecutrix examined photographic display from which she picked defendant's photograph, the error was erased when prosecutrix subsequently identified defendant and was cross-examined as to her identification of defendant, as the police officer's testimony then became admissible to corroborate the testimony of the prosecutrix.

4. Criminal Law ⇐339.11(2)

Where cross-examination of both prosecuting witness and police detective was searching, tenacious, and thoroughly competent to test reliability of the prosecution witness' identification of defendant as her assailant, trial court did not err in refusing to conduct a pretrial hearing on motion to suppress in-court identification of defendant.

5. Criminal Law ⇐339.11(7)

Testimony by prosecutrix that she got a good look at her assailant while they were standing in the light at a bar, that she was sure that defendant was her assailant, that she had given a description of defendant prior to viewing mug shot files, and that she had picked defendant out of the mug shot files as soon as she saw his picture was sufficient to permit the prosecutrix to make an in-court identification of defendant despite contention that the pretrial photographic identification procedure was unduly suggestive.

6. Criminal Law ⇐698(1), 1169.12

In the absence of objection or other prompt request for relief, it was not error to permit police officer to testify that, after defendant was given his *Miranda* rights, he did not make any statement; even if the interrogation did invade the defendant's Fifth Amendment right of silence, it was not prejudicial. U.S.C.A.Const. Amend. 5.

Terrence R. Fitzgerald, Deputy Public Defender, David M. Lewis, Asst. Dist. Defender, Louisville, for appellant.

Robert F. Stephens, Atty. Gen., Victor Fox, Asst. Atty. Gen., Frankfort, for appellee.

PALMORE, Justice.

James Willard Summitt appeals from a judgment sentencing him to life imprisonment pursuant to a jury verdict finding him guilty of rape. KRS 435.090 (now superseded by the Kentucky Penal Code, eff. January 1, 1975).

Shortly after midnight of July 20–21, 1974, Donna Jean Furgason was abducted by two men and raped by one of them. Some 20 hours later, after having reviewed over 1200 "mug shots" at the headquarters of the Jefferson County and Louisville police, she identified a photograph of the appellant as the man who raped her. In due course he was arrested and brought to trial. His defense was a denial that he was the guilty party.

The first contention on which Summitt relies for a reversal is that the trial court erred in permitting a police detective to relate substantive details of the report Donna had given him before she looked through the photographs. He stated, for example, that she was fearful because her assailant had warned her that if she reported the incident to the police he would do harm to her and her family, and that she described him as follows:

"The subject that had done the rape was supposed to have been a white male, in his 30's approximately five foot nine, 180 to 190 pounds, had a rough complexion and had tattoos on both arms. She said that she heard him—she knew that he went by the name of Jimbo, that was his nickname, and that she had learned this during the offense."

The detective was the first witness called by the Commonwealth, and when he began to testify from his report Summitt's counsel objected on grounds of the hearsay rule. In overruling the objection the trial court commented, "She is going to testify."

[1–3] We agree that from the standpoint of this witness the statement received from the victim was purely hearsay and at this stage of the trial was inadmissible. As it developed, however, and in our opinion would inevitably have developed, the trial focused on the reliability of the identification. Even had Donna testified before the detective, the only avenue of defense was to discredit her initial identification of Summitt from the police photograph. Once that attack was made through cross-examination, evidence that she had accurately described him before she saw the photograph was competent for corroborative purposes. Cf. 4 Wigmore, Evidence §§ 1130, 1132 (Chadbourne rev. 1972); *Preston v. Commonwealth*, Ky., 406 S.W.2d 398, 403 (1966). So, while the detective should not have been allowed to give the details of what Donna said to him during their first interview until after she had appeared as a witness and had been cross-examined, the error was erased by subsequent legitimation of the incompetent testimony.

Before the first witness was introduced, counsel for the appellant unsuccessfully sought an evidentiary hearing on his motion to suppress or exclude Donna's in-court identification of Summitt. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), is cited for the proposition that the denial of such a hearing is constitutionally fatal. As the Commonwealth points out, however, the pertinent decision with reference to photographic identification is *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), which says:

"Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at p. 384, 88 S.Ct. at p. 971.

[4, 5] Before viewing the mug-shot files Donna had described the appellant as having a "rough" complexion and tattoos on his biceps. Under cross-examination she strongly resisted the insinuation that her in-court identification was influenced by her having seen Summitt several times during pretrial court appearances. She said that she got a good look at him "right in the light at first when we went through that bar. We were in the light and I know that was him," and "I knew his face right away . . . I picked him right out of there." Although the particular photograph from which she identified him was not available at the trial, the detective was positive that it did not show his arms. Counsel's cross-examination of both Donna and the detective was searching, tenacious and thoroughly competent to test the reliability of the identification. We find no error in the trial court's refusal to conduct a suppression hearing and no semblance of impermissible suggestiveness in the identification procedure.

The last claim of error relates to the following testimony elicited from the detective:

Q—"Were you present at any time with the defendant after he had been placed under arrest?"

A—"Yes, sir, I went with him to talk to him to try to determine if there was a second party involved."

Q—"And did you advise him of his Miranda rights before you talked to him, or was he advised of his rights?"

A—"Yes, sir, I advised him of his rights."

Q—"Did he give a statement to you of any kind?"

A—"No, sir, he did not."

[6] As the appellant had not made any statement, there was of course no occasion to inquire whether he had been advised of his right to remain silent. Hence it might not be altogether unreasonable for one with a nasty mind to suspect that the prosecutor's design was to get it across to the jury that he did not deny his guilt. As it is, however, appellant's trial counsel must not have thought it hurt, because he did not voice any objection. In the absence of an objection or some other prompt request for relief there was no possible error on the part of the trial court.

Nevertheless, appellant contends that this alleged invasion of his Fifth Amendment protection was so egregious in view of the closeness of the case and the severity of the penalty that a reversal is mandatory anyway. We do not regard the evidence as all that close. The identification, for all that counsel may denigrate it, was positive and convincing. The witnesses referred to in the appellant's brief as having corroborated his testimony were not able to render much help. His story that his leg was in a cast broke down when the hospital bill indicated that the accident in which it was hurt happened on the night of July 23–24, 1974, three days after the rape. Moreover, although we wish to discourage the type of questioning here under discussion, and to warn against its possible consequences, we are not ready to hold that in this particular instance it was all that bad. Certainly it was innocuous in comparison with the example in *Niemeyer v. Commonwealth*, Ky., 533 S.W.2d 218 (1976). The prosecuting attorney did not allude to it in his cross-examination of the appellant, nor did he mention it in his summation to the jury. There having been no objection, there was no error on the part of the trial court. If the interrogation invaded the appellant's Fifth-Amendment right of silence (which we do not decide), we find beyond a reasonable doubt that it was not prejudicial.

The judgment is affirmed.

All concur.

Jewell Wayne HENDRICKS, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Supreme Court of Kentucky.

April 22, 1977.

Defendant was convicted in the Madison Circuit Court, James S. Chenault, J., of first-degree manslaughter and he appealed. The Supreme Court, Sternberg, J., held that: (1) it was not necessary to give instruction on theory of accident, where, in order to find defendant guilty, jury necessarily had to negate explanation of accidental killing; (2) trial judge did not abuse discretion in permitting evidence of defendant's threats against life of the victim, his wife, and her family; and (3) trial judge did not abuse discretion in allowing testimony of defendant's three children, who were 13, eight and seven years of age when the killing took place.

Affirmed.

1. Homicide ⇐125

That killing was purely accidental is not "defense" which must be negated if there is evidence to raise it, but is simply denial that act was done with required culpable state of mind.

JUDGMENT ENTERED IN JEFFERSON CIRCUIT COURT

ON JUNE 4, 1976

This day, the defendant was brought into court by the Sheriff. Comes his attorney Mr. Zeman. This case being called on the defendants motion for a new trial herein, the court being advised, overrules said motion herein. The defendant was advised of his legal right to appeal this judgment and if he could not afford counsel, the court would appoint him counsel and if indigent will be allowed to proceed in forma pauperis, the defendant acknowledge receipt of said information herein. The defendant was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advise of counsel, none being shown, it is ordered and adjudged that the defendant being _____years of age, be taken by the Sheriff of Jefferson County to the jail of Jefferson County and from there by the Sheriff of said Count and transferred to the custody of the Department of Corrections at such location as the Department shall designate and remain in their custody for a period of not more than life.Ordered that he be and is remanded to jail.